

# XO Communications Services, Inc.

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## Request for Review of Decision of the Universal Service Administrator

WC Docket No. 06-122

June 23, 2011

# About XO Communications Services, Inc. ("XOCS")

- One of the largest facilities-based competitive providers of telecommunications and information services in the country
- Provides services to businesses, government customers, information service providers and telecommunications carriers
  - Business/government services include - data and voice communications services, Internet access, VoIP and managed Internet Protocol ("IP") (*i.e.*, IP-VPN and MTNS)
  - Carrier services include - IP, data, high-capacity metro and intercity dedicated transport circuits and wholesale voice and data origination and termination services

# XOCS Request for Review of USAC Decision

- USAC audit initiated July 2008 covering XOCS's CY 2007 revenues (2008 Form 499-A). Audit took 27 months to complete
- XOCS provided extensive explanations of its revenue-reporting methodology
- USAC discarded XOCS's methodology and attempted to recreate XOCS's Form 499-A using USAC's own methodology
- XOCS dedicated time from 35 executives and subject matter experts and devoted over 3000 man hours reviewing USAC's methodology
- XOCS created 56-page presentation identifying factual and legal errors

# XOCS – Issues Before the FCC

- 4 Issues Related to XOCS Audit:
  - USAC Request for Guidance (Confirmatory Certifications) / XOCS Reseller Appeal (Wholesale Revenue Classifications)
  - Classification of Revenues from Physically Intrastate Dedicated Transport Circuits
  - Classification of Revenues from Multi Transport Network Services provided via MPLS-based Protocol Processing
  - Credit for Prior USF Contributions Pending FCC Review of Order Limiting 499-A Filings Resulting in Downward Adjustments

# Issue 1: Verification of Reseller Status

- Identification of reseller revenues is a long-standing question pending before the Commission
  - Subject of several pending appeals: See, e.g., *In re: Grande Communications Request for Review of Decision of the Universal Service Administrator*, WC Dkt. No. 06-122 (filed Dec. 28, 2009); *Request for Review by AT&T Inc. of Decision of the Universal Service Administrator*, CC Dkt. No. 96-45 (filed Oct. 10, 2006)
- Guidance Request and XOCS Appeal raise complementary issues – is USAC fairly weighing “other reliable proof”
- All Commenters agree that USAC is imposing an unreasonably strict burden on wholesale carriers

# USAC Applies the Wrong Reseller Standard

- *Global Crossing* and *Network IP* confirm that filers have several options for verifying a customer's reseller status
  - Affirmative knowledge the reseller is contributing to the USF
  - Demonstrate a reasonable expectation through the procedures in the Form 499-A Instructions, which are only non-binding guidance
  - Demonstrate a reasonable expectation that reseller customers will contribute to the USF through "other reliable proof"
- USAC ignores the FCC's clear statements (Reseller DAF at 16):
  - "[USAC] rejects the Carrier's contention that the Instructions are merely guidance"
  - "The FCC has consistently treated the instructions as binding"

# XOCS Reasonably Relied Upon “Other Proof” When Identifying Resellers

- XOCS appeal (non-contributors)
  - Reseller certifications with valid language, executed prior to the audit year, provided a reasonable expectation. USAC refused to consider the evidence solely because it was not signed in the audit year
    - For 3 of the 6 resellers, the certification was signed less than 6 months prior to the audit year
  - Contemporaneous USAC reports to FCC listing resellers as 499-Q filers also provided a reasonable expectation
    - 2 of the 6 resellers were listed by USAC as filers during the audit year
  - Confirmatory certifications executed during the audit attest that the reseller contributed
- Other errors
  - USAC “reclassified” revenues not actually treated as wholesale by XOCS
  - USAC reclassified collocation and non-telecom revenues as end user telecom revenue

# XOCS Reasonably Relied Upon “Other Proof” When Identifying Resellers

- USAC Guidance Request (contributing resellers)
  - Resellers are large, nationally recognized carriers. USAC’s own records confirm their actual contributions in the audit year
    - Reclassification of revenues from confirmed contributors violates Section 254
  - Confirmatory certifications executed during the audit attest that the reseller actually contributed
    - Certifications verify information in prior certifications USAC disregarded as “outdated”
    - Certifications confirm actual conduct whereas other certifications attest to intentions to contribute
- USAC approach has lost sight of the true nature of the inquiry



# FCC Clarification Needed

- USAC acknowledges confusion surrounding reseller verification
- Appeal and Guidance request generated significant comments identifying persistent problems
- Despite recent decisions (*Global Crossing*, *Network IP*) issues continue to recur
- Comprehensive clarification or restatement of wholesale obligations would most efficiently resolve pending and recurring issues

# Issue 2: Classification of Private Line Revenues

- A definitive classification of private line revenues is needed
  - Common issue for carriers. Classification of intrastate or interstate traffic is often disputed
- USAC mistakenly sought to reclassify, from intrastate to interstate, the revenues from XOCS's dedicated transport service comprised of physically intrastate circuits configured as closed networks
- USAC erroneously reversed FCC presumption for private line circuits
  - USAC requiring carriers to prove *intrastate* use, rather than demonstrate interstate use

# XOCS Accurately Classified Physically Intrastate Private Line Service Revenues

- XOCS's private line service at issue in this appeal:
  - Provided on physically intrastate (physical end points in same state) circuits
  - Circuits configured as closed network
  - Permits communications between specified customer end points only
  - No evidence that the services are used for any interstate purposes

# XOCS Accurately Classified Physically Intrastate Private Line Service Revenues

- USAC lacks authority to adopt presumption that, absent evidence to the contrary, all private line service revenues are interstate.
- USAC misinterprets the FCC's 10% Rule:
  - Applies only where private line carries intrastate *and* interstate traffic
  - Requires evidence of interstate use, not proof of non-interstate use
  - Correct presumption is that physically intrastate private lines are intrastate unless evidence (e.g. via carrier certification) shows more than *de minimis* amount of traffic is interstate
- USAC position alters the Separations process without adequate input
  - USAC rule would eliminate virtually all intrastate private line revenues except where customers provide intrastate use certifications

## Issue 3: Classification of Multi Transport Network Service Provided via Multi Protocol Label Switching

- Commenters agree that the FCC should clarify, via rulemaking, the regulatory classification of MPLS-based services
- The correct classification of MPLS-based services is before the FCC in several other proceedings
  - *Masergy Communications Inc. Petition for Clarification, or in the Alternative, Application for Review, Universal Service Contribution*, WC Dkt. No. 06-122 (filed March 27, 2009); USAC Guidance Request, See Letter from Richard A. Belden, Chief Operating Officer, USAC, to Julie Veach, Acting Chief, WCB, FCC (dated Aug.19, 2009)

## Issue 3: Classification of Multi Transport Network Service Provided via Multi Protocol Label Switching

- USAC wrongly attempted to reclassify all of XOCS's revenues from Multi Transport Network Service ("MTNS") as telecommunications and focused on jurisdictional nature of service
- Threshold question was whether the service is appropriately classified as an information service

## XOCS's MTNS Revenues are Accurately Classified as Information Service Revenues

- XOCS's MTNS:
  - Provides wide area network solution utilizing multi protocol label switching (“MPLS”) technology
  - Offers multiple capabilities across a single circuit
  - Utilizes protocol processing and provides advantages of MPLS-enabled IP network, dedicated Internet access and flexibility in selecting port speeds and committed bandwidth levels

# XOCS's MTNS Revenues are Accurately Classified as Information Service Revenues

- Wireline Competition Bureau has stated MPLS-based services such as MTNS can be classified as an information service or telecommunications
  - FCC requires each MPLS-based service to be evaluated on its own merits when determining appropriate regulatory classification
- USAC did not conduct inquiry into XOCS's MTNS service features, functions or capabilities.
  - Initial report assumed the service was a private line telecom service and inquired only as to its jurisdictional classification
- USAC later chose only to review XOCS marketing materials that did not provide detailed information about the service configuration, functions and features.



## XOCS's MTNS Revenues are Accurately Classified as Information Service Revenues

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- XOCS's MPLS service provides protocol processing, wireline broadband Internet access and other enhanced functions that are inextricably intertwined with transmission components
- Protocol processing in MTNS not limited to internetworking protocol

# Issue 4: Use of Credits to Reverse Prior Reporting Errors

- XOCS erroneously assessed and paid USF on internal XOCS accounts for CY 2005-2008
- XOCS reported a credit for these prior year contributions on its revised 2008 Form 499A
- USAC agreed that XOCS internal accounts should not have been assessed USF
- However, USAC disallowed credits related to CY 2005-2006 and CY2008 - over half of the credit amount - based on a 2004 Wireline Competition Bureau (“Bureau”) order establishing a one year limit on Form 499-A revisions that decrease a filer’s USF contribution (the “One Year Downward Adjustment Deadline”)

# The 1 Year Downward Adjustment Deadline is Arbitrary and XOCS Should be Permitted to Apply Credits for Errors in Prior Years

- One Year Downward Adjustment Deadline is invalid:
  - Substantive rule change that exceeds the Bureau's delegated authority
  - Adopted without following notice and comment rulemaking requirements of Section 553 of the Administrative Procedure Act
- One Year Downward Adjustment Deadline is arbitrary:
  - Filers limited in making filings decreasing USF contributions but no similar limit on filings that will increase USF contributions
  - Federal tax code uses same statute of limitations for underpayments and overpayments
  - Internal Revenue Code permits netting of overpayments and underpayments for applicable years if still open under statute of limitations

## The 1 Year Downward Adjustment Deadline is Arbitrary and XOCS Should be Permitted to Apply Credits for Errors in Prior Years

- One Year Downward Adjustment Deadline is the subject of several pending petitions before the FCC:

*See, e.g.,* Qwest Communications International Inc. Application for Review, CC Dkt. No. 96-45 (filed Jan. 10, 2005); SBC Communications Inc. Application for Review of Action Taken Pursuant to Delegated Authority, CC Dkt. Nos. 96-45, 98-171, 97-21 (filed Jan. 10, 2005); Business Discount Plan, Inc. Application for Review, CC Dkt. No. 96-45 (filed Jan. 10, 2005)

- The Commission should decide XOCS's appeal of the Past Errors issue when it rules on the applications for review